

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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WASHINGTON, D.C. 20554

In the Matter of
Toll Free Service Access Codes

CC Docket No. 95-155

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TO: The Commission

REPLY COMMENTS

1-800-FLOWERS

INTRODUCTION

1-800-FLOWERS, like several other commenters in this proceeding, is a business which did not exist until the Commission permitted the provision of 800 numbers. And like these other commenters, 1-800-FLOWERS has tapped this important communications policy decision, and with hard work and insight it has built its business based upon a relationship of recognition and trust with the general public. This relationship, and the business behind it, depends on the close association between the toll-free phone number, the business identification (the brand) and the reputation of that business among the public.

Among the comments filed, entities which have direct experience with the 800 code, including both number holders and carriers,¹ recognize the need to protect those numbers which have become

¹ See Comments of AT&T Corp. at p. 23. See also Comments of MCI Telecommunications Corporation at p. 15.

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directly associated with, or represent the brand identity of, the company holding those numbers. These commenters agree that such protection is best conferred through a right of first refusal, which is fair to number holders, like 1-800-FLOWERS, protects customers, avoids confusion and misrepresentation, and minimizes administrative responsibilities and regulatory involvement.

Those comments which oppose the right of first refusal substantially overestimate the impact this policy will have on number availability, and they substantially underestimate the impact which a lack of adequate Commission-conferred protection will have on businesses and their customers, and inevitably on the 888 numbers.

Those who oppose the right of first refusal apparently lack adequate experience with the consumer lessons learned in the use of the 800 numbers, including the reality of consumer confusion, mistakes and deception. These lessons are relevant to and must guide the Commission's implementation of the new 888 number plan.

The right of first refusal will not add to the demand for 888 numbers. These numbers will be sought by competitors if they are not assigned to 800 users. The right should be carefully crafted to be available to those 800 users that have developed widely recognized numbers, and particularly brand names. With such criteria, the right will serve the public's interest by assisting with the transition and by avoiding abuse and fraud.

Alternatives to the right of first refusal are inadequate to address these realities and would exacerbate just these problems, and undermine the investments that many companies have made to create goodwill and promote the use of toll free 800 numbers.

The issues raised by the Commission are communications policy questions. The Commission has the ability and the responsibility

to act, and in so doing, it will maximize the protection of the public and 800 number holders without the need for regulation and litigation.

**RIGHT OF FIRST REFUSAL IS THE BEST PROTECTION
FOR QUALIFIED 800 SUBSCRIBERS**

Those comments which best understand the toll free market realities agree that the right of first refusal affords the best, least regulatory and least litigious protection for those companies which have built brand identity in their 800 numbers and their customers. It will allow businesses to decide what is appropriate for themselves and their customers and to protect themselves against unfair competitive tactics. It will protect customers against fraud, and it will assist with the education of consumers about the new code.

In its comments, AT&T proposes criteria to determine those users which would be eligible for the right of first refusal. 1-800-FLOWERS agrees that this is a good measure of those users which should be protected. Specifically, the numbers must have been advertised, be widely known, and be called by consumers.² Implicit in this proposal is a high correlation between the number and the users' business identity.

The right of first refusal will not exacerbate the demand for 888 numbers. As AT&T's comments suggest, only those companies with a strong substantive need for this protection should exercise the right. This criteria will limit the number of companies that would be eligible. In addition, the Commission should consider whether a reasonable fee should be assessed, for example to reimburse the costs of administering the process. Such a fee should

² Comments of AT&T at p. 24.

discourage those without a substantial and quantifiable economic interest in their toll free numbers from exercising the right.³

1-800-FLOWERS would exercise the right of first refusal if it were made available. And it proposes to do so in a way that is intended to assist the public education process and avoid confusion. 1-800-FLOWERS' exercise of the right will not add to the demand for 888 numbers, because its business plans anticipate the need for additional toll free numbers. Hence, the right of first refusal is a "win-win" policy; it will protect the public from fraud and confusion, it will allow this company to protect itself from such deception and consumer uncertainty, and it will do so by giving it access to numbers which it would require in any event.

The number exhaustion argument is a "red herring." In reality, the question is not whether these numbers will be requested. The question is who will obtain them, and when. If the right of first refusal is permitted, the numbers will be assigned to those qualified companies which have invested in the 800 equivalent and hence have given value and meaning to these numbers. If the right of first refusal is not permitted, the numbers will be assigned to whatever company is first in the door to request the number and that company will be either the same 800 company or it will be that companies' competitor. The "end of the line" and similar options may make such competitive use more difficult but will not prevent it.⁴

Contact with 800 companies during the implementation of the new 888 code will cut down on customer frustration, fraud and confusion. Would-be competitors will not be able to use the new ac-

³ Comments of the Weather Channel, Inc. at p. 3.

⁴ Comments of TLDP Communications, Inc. at p. 2. See also Comments of Aeronautical Radio, Inc. at p. 5.

cess codes to unfairly compete with current 800 users. Preventing this unfair competition will help companies and their franchisees, affiliates, and customers, all of whom are harmed when orders intended for one company are received by other companies. Customer calls will be answered by the party intended rather than being diverted, incomplete or answered by an unrelated user.

The right of first refusal is the only way to prevent unnecessary and costly litigation, while protecting companies and consumers from unfair or deceptive competition. Many of those commenters which oppose the right suggest that harmed companies could sue the offending parties. This may appear to be a more attractive option to companies which have a cadre of attorneys on staff, but many 800 users, such as 1-800-FLOWERS, are small businesses without the resources to wage such campaigns.

Those comments also ignore the fact that the 800 rules as well as the 888 rules involve communication policies, and the impacts of these policies on the public, including 800 users should be determined by communications policy. This is especially so since the solution is easy and essentially self-enforcing--a far less regulatory and litigious result than thrusting the problems on the Commission and the courts.

END OF LINE ASSIGNMENT DOES NOT PROTECT QUALIFIED 800 USERS

Some commenters support an "end of line" assignment option, whereby protected numbers would not be available for assignment for some period of time, for example until other 888 numbers have been depleted⁵ or until the expiration of an artificial "waiting period."⁶

⁵ Comments of Sprint Corporation at pp. 18-19.

Some organizations suggest blocking of brand identity numbers for a limited period of time⁷ or delaying assignment until the public has been educated about 888 codes.⁸

Such approach does not permit 1-800-FLOWERS to ensure that its customers can continue to reach the company during the transition. These approaches do not address the customer frustration that will accompany unanswered calls. They would not prevent unfair competition trading on the name and reputation of the company; they would merely delay those opportunities.⁹ Lastly, as noted above, these options would not reduce demand for these 888 equivalent numbers, but merely defer that race between 800 users and their competitors or brokers.

Proposals to include a non-compete policy would impose a heavy enforcement burden on the Commission, plunging it deeply into the realm of commerce, far afield of its communications expertise and responsibilities.

Moreover, 1-800-FLOWERS wishes to obtain its replicated numbers in the 888 code in order for its customers to continue to reach the company. In turn the company can reinforce the education program by advising customers about the introduction of the 888 code and that the 800 code is still in effect. By dealing directly with customers, 1-800-FLOWERS thinks that it can assist with the transition and facilitate consumer acceptance of this new code.

⁶ Comments of Nynex at p. 8. See also Comments of Time Warner Communications Holdings, Inc. at p. 8.

⁷ Comments of Scherers Communications Group at p. 17.

⁸ Comments of U S West Communications, Inc. at p. 20.

⁹ See Comments of Service Merchandise Company at p. 2-3.

INDUSTRIAL CLASSIFICATION IS NOT A WORKABLE OPTION

Many commenters noted that code assignments based on industrial classification is not a workable approach.¹⁰ Administratively defining and segregating competitors with clarity based on such designations is described as cumbersome, inaccurate and ineffective at preventing the very types of fraud and misuse that concern 800 users. Moreover, it would not address changes in business activity after numbers have been assigned nor would it prevent the illegal brokering of those numbers once the numbers had been distributed.¹¹ This option does not deal with customer frustration or confusion or with the impact on non-competing users caused by misdialed numbers. Like the non-competition suggestion, it would plunge the Commission into a regulatory quagmire of categorization and enforcement, requiring resources, constant vigilance and prompt action when mistakes and deceptions occur.

TRADEMARK LAW IS INADEQUATE PROTECTION--AT BEST

Some commenters have suggested that trademark law would protect 800 users.¹² These comments are wrong for several reasons.

¹⁰ Comments of United States Telephone Association at p. 2. See also Comments of American Petroleum Institute, NIMA International, Weather Channel, Inc., Telco Planning, Inc., American Car Rental Association, Bass Pro Shops, Bell Atlantic, MCI Telecommunications, Corp., MFS Communications Company, Time Warner Communications Holdings, Inc., Pacific Bell and Nevada Bell, Ameritech, Scherers Communications Group, Inc., Sprint Corporation, Southwestern Bell Telephone Company, U S West Communications, Inc., Service Merchandise Company, Inc., Americas Carrier Telecommunications Association, LDDS WorldCom, and The 800 Users Coalition.

¹¹ It has been proposed, to prevent the misuse and deceptive use of brand identity numbers in the 888 code, that the use of replicated acronyms be prohibited. As with industrial classifications, this is unworkable and would be costly to enforce. The policing of such a policy would be time consuming, costly for the Commission and litigious.

Not all companies with brand identity numbers fall within the narrow categories of trademark protection.¹³ Many 800 businesses, however, have built strong brands based on the toll free numbering policy of the Commission. Additionally, as a matter of law, other comments have pointed out that trademark law is in conflict between jurisdictions.¹⁴

Further, the policies which have fostered the success of the 800 code are communications policies, not trademark policies. The companies whose efforts have built this 800 code success depended on these communications policies. It is in the power of the Commission to prevent harm to users and consumers. Hence, it should be communications policy which addresses the consequences of its earlier policies, as it determines the best way to proceed with the new code.

It is very possible that acting to protect those with 800 "investments" in branded numbers will facilitate customer acceptance of the new 888 code, because the companies with the greatest public recognition in the 800 code will be a major part of the transition. It is also possible that by protecting the 800 brands, the Commission will add value to the 888 numbers through the business certainty that comes with this protection.

Even for those companies with the legal and economic ability to pursue a trademark remedy, the "recovery" is apt to be "too little too late." As some comments have suggested, lost business

¹² Comments of Bell South at pp. 16-17. See also Comments of ALLNET, Joel DeFazio, Bell Atlantic, Paging Network, Inc., GTE, Sprint Corporation, Southern New England Telephone Company, AirTouch Paging, and Competitive Telecommunications Association.

¹³ See Comments of Weather Channel, Inc. at p. 8-9. See also Comments of Telco Planning, Inc., Telecompute Corporation, Brass Pro Shops, Service Merchandise Company, Inc., Direct Marketing Association, LDDS WorldCom, and The 800 Users Coalition.

¹⁴ Comments of Weather Channel, Inc. at p. 8-9.

revenues from misdialed calls would be difficult to quantify and costly to prove, while compensation is not assured, since deceptive competitors may be undercapitalized or may discontinue operations once a law suit is filed, leaving the legitimate 800 subscriber company with no real recourse.

Additionally, trademark law does nothing to protect 800 customers from the damages which could be caused when they wish to call a known and well regarded company, but err in dialing and reach another, less well run company. These customers are communications consumers as well as 800 services consumers, and they should expect communications regulations to afford some measure of protection. Nor will trademark law repair the damaged reputation caused by the types of deceptive practices which have been described.

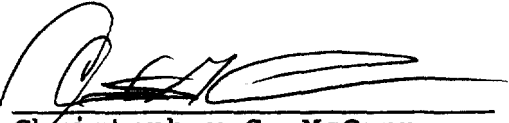
CONCLUSION

The Commission is encouraged to implement a method for the distribution of new toll free numbers which continues to foster legitimate and healthy businesses and to protect customers from deception and needless confusion and frustration. The right of first refusal is the most effective way to advance the new 888 toll free code. The right of first refusal is important protection for 800 users; it is self-enforcing; it can be self-funding; it will avoid costly and unnecessary litigation. The right of first refusal uses communications tools to protect the users and the customers of com-

munications services, which is the best and most appropriate course of action for the Commission to take.

Respectfully submitted,
1-800-FLOWERS

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